

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

CHRIS CRAVEN,

Petitioner,

v.

**RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.**

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Civil Action No. 4:12-CV-454-Y

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND NOTICE AND ORDER**

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a state prisoner under 28 U.S.C. § 2254.

B. PARTIES

Petitioner Chris Craven, CID #0306332, is a state prisoner currently in custody of the Tarrant County Sheriff's Office in Fort Worth, Texas.

Respondent Dee Anderson is the Sheriff of Tarrant County, Texas.

C. FACTUAL AND PROCEDURAL HISTORY

On February 25, 2011, in cause numbers 1220649R and 1220650R, petitioner entered open pleas of guilty to theft (\$1,500–\$20,000) and evading arrest, both state jail felonies, in the 432nd

District Court of Tarrant County, Texas. (Resp't App. at 4, 9) Petitioner also entered pleas of "true" to the sentencing enhancement allegations in each indictment, increasing his punishment to that of a third-degree felony, and the trial court assessed his punishment at ten years' confinement for the theft offense and eight years' confinement for the evading offense. (*Id.*) Petitioner appealed the trial court's judgments, but the Second District Court of Appeals of Texas affirmed the judgments on June 7, 2012. (*Id.* at 13-14) On July 25, 2012, petitioner filed two petitions for discretionary review, one for each case, which remain pending in the Texas Court of Criminal Appeals at this time. (*Id.* At 15-17) This federal petition for habeas relief is deemed filed June 28, 2012.¹

D. ISSUES

Petitioner raises seven grounds, in which he claims that he was denied effective assistance of trial and appellate counsel, a fair and impartial trial, access to the courts, and his right to cross-examine and confront his accusers and that his sentence was excessive in violation of the Equal Protection Clause. (Pet. at 6-7A)

E. RULE 5 STATEMENT

Respondent has filed a motion to dismiss the petition without prejudice on exhaustion grounds. (Resp't MTD at 3-5)

F. EXHAUSTION OF STATE COURT REMEDIES

Applicants seeking habeas corpus relief under § 2254 are required to exhaust all claims in state court before requesting federal collateral relief. 28 U.S.C. § 2254(b)(1), (c)²; *Fisher v. Texas*,

¹A pro se habeas petition is deemed filed when the petition is delivered to prison authorities for mailing. *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998).

²The terms of 28 U.S.C. § 2254(b) and (c) provide in pertinent part as follows:

(continued...)

169 F.3d 295, 302 (5th Cir. 1999). The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest court of the state. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-48 (1999); *Fisher*, 169 F.3d at 302; *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982). This requires that the state court be given a fair opportunity to pass on the claim, which in turn requires that the applicant present his claims before the state courts in a procedurally proper manner according to the rules of the state courts. *Depuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1988).

For purposes of exhaustion, the Texas Court of Criminal Appeals is the highest court in the state. *Richardson v. Procnier*, 762 F.2d 429, 431 (5th Cir. 1985). Thus, a Texas prisoner may satisfy the exhaustion requirement by presenting both the factual and legal substance of his claims to the Texas Court of Criminal Appeals in either a petition for discretionary review and/or a postconviction habeas corpus application pursuant to article 11.07 of the Texas Code of Criminal

²(...continued)

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005); *Anderson v. Johnson*, 338 F.3d 382, 388 n.22 (5th Cir. 2003).

Petitioner's claims have not been properly exhausted in state court because the Texas Court of Criminal Appeals has not yet had the opportunity to review and rule on the merits of the claims. Because the state court has not been afforded a fair opportunity to consider the merits of petitioner's claims and render a decision, a ruling from the federal court at this juncture would be premature. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982) (the exhaustion requirement is "designed to protect the state courts' role in the enforcement of federal law and prevent the disruption of state judicial proceedings").

Petitioner must first pursue his state appeal through completion, and state habeas corpus remedies if necessary, before seeking relief under § 2254. Absent a showing that state remedies are inadequate, such showing not having been demonstrated by petitioner, he cannot now proceed in federal court in habeas corpus. *See* 28 U.S.C. §2254; *Fuller v. Florida*, 473 F.2d 1383, 1384 (5th Cir. 1973); *Frazier v. Jones*, 466 F.2d 505, 506 (5th Cir. 1972). Accordingly, dismissal of this federal habeas corpus proceeding for lack of exhaustion is warranted so that petitioner can fully exhaust his state court remedies and then return to this court, if he so desires, after exhaustion has been properly and fully accomplished.

II. RECOMMENDATION

Based on the foregoing, it is recommended that respondent's motion to dismiss be granted and that petitioner's petition for writ of habeas corpus be dismissed without prejudice, except as to any application of the federal statute of limitations or other federal procedural bar that may apply.³

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 10 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation until September 25, 2012. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

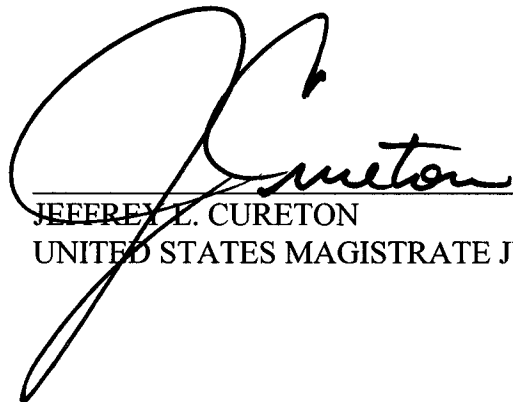
³28 U.S.C. § 2244(d) imposes a one-year statute of limitations for filing non-capital habeas corpus petitions in federal court, subject to any applicable tolling. *See* 28 U.S.C. § 2244(d)(1)-(2).

IV. ORDER

Under 28 U.S.C. § 636, it is ordered that each party is granted until September 25, 2012, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ordered that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

It is further ordered that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED September 5, 2012.



JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE